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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HASANI VALENTINO MOTON,

Defendant and Appellant.

D074691

(Super. Ct. No. 16CR051426)

APPEAL from a judgment of the Superior Court of San Bernardino County, J.

David Mazurek, Judge. Affirmed in part, vacated in part with direction.

Dawn S. Mortazavi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White, Stephanie H. Chow and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Hasani Valentino Moton of second degree robbery (Pen. Code, § 211; count 1)¹ and of being an accessory after the fact to the crime of robbery (§§ 32, 211; count 2). The court sentenced Moton to the low term of two years in prison for count 1 and a middle term of two years for count 2, with the sentences to run concurrently.

On appeal, Moton contends: (1) there was insufficient evidence of force used against the victim to support his convictions for robbery or being an accessory after the fact to robbery, (2) the court failed to instruct the jury on a lesser included offense of theft, (3) there was insufficient evidence to uphold convictions for both being an aider and abettor to robbery and an accessory after the fact to robbery because they were based on the same factual act, i.e. being the getaway driver, and (4) if count 2 is not reversed, the sentence should be stayed pursuant to section 654. We disagree with Moton's first two contentions. However, the People concede, and we agree, with the third contention. Therefore, we vacate the conviction as to count 2 and direct the trial court on remand to amend the abstract of judgment accordingly. In all other respects, we affirm the judgment.

¹ Further statutory references are to the Penal Code unless otherwise stated.

BACKGROUND

A

On September 9, 2016, the victim and her husband were in a grocery store parking lot putting groceries in the trunk of their vehicle. The victim had her hand on her purse, which was sitting in a shopping cart where a child can sit. She had \$500 to \$600 in cash, credit cards, identification cards, medical cards, an electronic tablet, and a handwritten grocery list in the purse. The victim suddenly felt an aggressive pull on her purse, which turned her backwards. The person who grabbed her purse took off running and the victim yelled, "my purse!" When the victim yelled, the victim's husband looked up and saw someone running away with the victim's purse.

The victim's husband chased the individual, who ran to a gray Toyota Scion that appeared to be waiting. The victim also followed. The driver of the Scion leaned over and opened the door, and the fleeing individual jumped into the front passenger seat of the vehicle. In court, the victim identified the driver as Moton, saying he looked in her eyes when he opened the door. Neither the victim nor the victim's husband saw the individual wave down the driver of the car or engage in any conversation.

The victim's husband had a plastic license plate frame in his hand as he ran after the individual and he tried to strike the vehicle with the license plate holder. It got stuck in the door and the vehicle took off, spinning the victim's husband around. The car stopped briefly, and someone threw out the license plate holder as they left the parking lot.

The victim's husband called their son and discussed whether the son could track the tablet that was in the stolen purse. The victim's son drove to meet his parents at the store. The victim's husband called the police.

An officer responded to the grocery store parking lot and spoke in Spanish with the victim, her husband, and son. The victim's husband described the driver of the vehicle as having a dark complexion while the person who grabbed the purse was Hispanic. The driver of the vehicle appeared bald. The victim's son used his phone to track the victim's stolen tablet and told the officer the tablet was pinging at an address two or three miles from where the robbery occurred.

The officer went to the location and observed a silver-gray Toyota Scion that matched the description of the suspect vehicle. He also saw a male with light complexion and a shaved head who was wearing a black T-shirt, who matched the description of the driver of the suspect vehicle. The officer identified Moton in court as the individual he saw at the residence.

As the officer looked through a window of the vehicle, he saw a grocery list handwritten in Spanish lying under the front passenger seat. The officer also observed damage to the front passenger door that appeared to be an imprint from a license plate frame, which was consistent with the account of the incident given by the victim and her husband.

The officer searched the residence and found items stolen from the victim in a bathroom cabinet. These items included identification cards, a checkbook, and a medical

card, all in the victim's name. The tablet was not located at the residence. It was located a couple of weeks later by a probation officer in another city.

The victim, her husband, and her son went to the residence at the request of the police. They identified the grocery list in the victim's handwriting as well as the victim's identification cards, checkbook, and other items. The victim's husband identified Moton at the residence as the driver of the vehicle. The victim did not know Moton and he did not have permission to have her things.

A friend of Moton said she was visiting Moton that day with her child. The friend gave Moton permission to drive her gray vehicle to the store for food and milk. Neither Moton nor the friend speak Spanish.

B

Moton testified in his own defense. He said his friend and her child visited him at his home on the day of the incident. He asked to borrow his friend's car to go to two grocery stores for food and milk.

As he was leaving the second store, Moton said he saw an acquaintance standing in front of the store. The acquaintance asked for a ride home. When Moton said he would put the groceries in the car, the acquaintance said he saw a relative he would ask for gas money to give to Moton.

Moton said he went to the car, put his groceries in the trunk, got in the car, and backed out of the parking space. After Moton started to proceed forward, he said the acquaintance came running to the car with a man chasing him, the acquaintance jumped in the back passenger seat. The acquaintance said his aunt's boyfriend was trying to jump

on him. Moton said he panicked and took off when he heard something hit the car. Moton denied opening the passenger door for the acquaintance. Moton denied stopping and throwing a license plate frame out of the vehicle. Moton said the acquaintance leaned to the right and held his side as though he were injured.

When they got to Moton's house, Moton said the acquaintance asked to use the bathroom. Moton got the groceries from the car as the acquaintance went into the house. Moton said he was dealing with the groceries, his friend who was asking what took so long at the store, the friend's child, and a puppy for about 45 minutes. He started to go see what was taking the acquaintance so long in the bathroom when police officers arrived.

C

In rebuttal, the police officer testified Moton appeared nervous when he was interviewed at his home and he was reserved in his answers. Moton told the officer an individual waved him down as he was driving by and Moton gave the individual a ride. Moton did not describe having a conversation with the individual outside of the grocery store or the individual going to talk to a relative. Moton did not say the individual ran to the vehicle or that Moton panicked and drove off after the individual got into the vehicle.

Moton told the officer the individual had something bulky under his shirt. He did not say the individual appeared injured or said he had been struck by the relative's boyfriend. Moton said the individual used the bathroom and left before police arrived.

DISCUSSION

I

Moton first contends there was insufficient evidence of force used against the victim when her purse was taken to support the robbery conviction. We disagree.

Where a defendant challenges the sufficiency of the evidence supporting a conviction, we " ' ' ' must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' [Citation.] ... 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 57.) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Clark* (2011) 52 Cal.4th 856, 943 (*Clark*).)

" 'Robbery is the taking of "personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.' " ' " (*Clark, supra*, 52 Cal.4th at p. 943.) "In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.' [Citation.] It thus is robbery when the property was peacefully acquired, but force or fear was used to carry it away." (*People v. Anderson* (2011) 51 Cal.4th 989, 994 (*Anderson*).)

" ' "The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance " ' [Citation.] [¶] The nonconsensual snatching of a purse has been held to entail such force as to permit a jury to return a verdict of robbery. 'Where property is snatched from the person of another ... the crime amounts to robbery.' " (*People v. Lescallett* (1981) 123 Cal.App.3d 487, 491 (*Lescallett*).)

In this case, there was evidence the purse was taken by force or fear or both. The individual who grabbed the purse, did not merely take it out of the cart and run. (See *In re George B.* (1991) 228 Cal.App.3d 1088, 1091–1093 [defendant committed grand theft from a person by grabbing a package from a cart held by the victim].) Rather, the victim testified her hand was on her purse in the shopping cart and she felt an aggressive tugging on the purse, which pulled or turned her "towards the back." She screamed, "my purse" as the individual grabbed her purse and ran away. Thus, the individual who took the purse overcame the resistance of the victim's hand by tugging it away with such force as to move her body. A victim of robbery need not even be aware someone is taking his or her property " 'so long as the defendant used force against the victim to take the property.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 507 [a robbery victim may be unconscious or dead when the property is taken].)

Both the victim and her husband chased after the individual as he ran to the car where Moton was waiting in the lane headed toward the exit. The victim said she looked in Moton's eyes as he opened the door for the person with her purse. The car then "took off," spinning the victim's husband around as she watched. The victim said she was

afraid during the incident. She screamed when the purse was taken, and she was afraid when she looked into the face of Moton as he opened the car door to let the person with her purse into the car before driving quickly away. (*Lescallett, supra*, 123 Cal.App.3d at p. 492 [testimony the victim was frightened supported an inference the nonconsensual removal of a purse was accomplished by force or fear or both].) Thus, there was sufficient evidence of robbery.²

II

Moton also contends the court erred in failing to give a sua sponte instruction on the lesser included offense of theft. Again, we disagree.

"Robbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of another ...' and 'is accomplished by the use of force or by putting the victim in fear of injury.' " (*Anderson, supra*, 51 Cal.4th at p. 994.) "Theft by larceny may be committed without force or the threat of violence and may be completed without the victim ever being present. [Citation.] To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) Thus, " '[t]heft is a lesser included offense of robbery.' [Citation.] Accordingly, even in the absence of a request, the trial court has a sua sponte duty to instruct on theft as a lesser included offense of robbery if the evidence has raised 'a question as to whether all of the elements

² Given the evidence of force and fear to take the purse from the victim, we need not consider the force applied to the victim's husband by the car as he tried to recover the purse.

of robbery were present and if there was evidence that would have justified a conviction of the lesser offense.' " (*People v. Friend* (2009) 47 Cal.4th 1, 51.)

Trial courts "must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he court need instruct the jury on a lesser included offense only '[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of ' the lesser offense." (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) We independently review claims of failure to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Here, there was no evidence the purse was acquired without force or fear. The person did not simply walk by and take an unattended purse from the cart. Rather, the victim was holding the purse in the shopping cart and felt an aggressive tug or pull on the purse as the individual snatched it. The action moved the victim's hand and body and she screamed as the person ran away with her purse to a waiting vehicle. Therefore, there was not substantial evidence to support an instruction for the lesser charge of theft.

III

Moton contends, the People concede, and we agree he cannot properly be convicted of being both an aider and abettor to robbery (count 1) and for being an accessory after the fact to robbery (count 2) based solely on the fact Moton drove the getaway car. "[A] defendant who is convicted as a principal cannot also be convicted as an accessory solely on the basis of his immediate flight from the crime scene and his subsequent denials of his own involvement, even if that conduct incidentally helps other principals to escape." (*In re Eduardo M.* (2006) 140 Cal.App.4th 1351, 1359.) Therefore, the accessory conviction is vacated. (*People v. Francis* (1982) 129 Cal.App.3d 241, 252–253.)

DISPOSITION

The conviction for count 2 is vacated and the matter is remanded with direction to the court to amend the abstract of judgment to eliminate reference to the conviction and

sentence for count 2 and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.